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SALE AND LEASE OF INDIAN WATER RIGHTS

by Bill Leaphart

INTRODUCTION

In the year 1888, a tract of land, the property of the United States, was reserved and set apart as the permanent home and abiding place of the Gros Ventre and Assiniboine Indians in the Montana Territory.

This property was designated as the Fort Belknap Reservation. Later, in 1908, a dispute arose over the use of the water in the Milk River which bordered upon this reservation. This case, *United States v. Winters*,[1] reached the Supreme Court of the United States and has become the touchstone of modern Indian water rights.

The water of the Milk River, a non-navigable river,[2] had been designated as the northern boundary of the reservation. It was alleged by the United States that all of the waters of the Milk River were necessary to facilitate the purposes for which the reservation had been created. The government contended that it was essential and necessary that all of the waters of the river flow down the channel undiminished in quantity and undeteriorated in quality so as to encourage habits of industry in the Indian community.[3]

The United States also alleged that, in the year 1900, the defendants violated the Indian water rights by entering the river above the reservation and by building dams and reservoirs which deprived the Indians of the use of the water.[4]

The defendants, on the other hand, alleged that their respective claims to the waters of the river were prior and paramount to the claims of the Indians who had claimed as of 1888. Defendants claimed that they acquired legal title to their land under the Desert Land Act (the Homestead Act) and that they had complied with the laws of Montana on appropriation of water. Defendants also claimed that it could not be held that the Indians understood, when making the treaty of 1888, that there was any reservation of the waters of the Milk River for use upon the Fort Belknap Reservation.

Justice McKenna, in holding for the Indians, reasoned that the government and the Indians, in creating the reservation, were attempting to change the nomadic habits of the Indians into those of a pastoral and civilized people. He also understood that the grant of land had been a grant *from* the Indians *to* the United States rather than vice versa. He stated: "The lands were arid and without irrigation, were practically

[1]Winters v. United States, 207 U.S. 564 (1908), affirming 143 Fed. 740, 74 C.C.A. 666 (9th Cir. 1906).

[2]Non-navigable for purposes of the Commerce Clause of the United States Constitution.

[3]Winters v. United States, *supra* note 1 at 567.

[4]*Id.*

valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government."[5] Justice McKenna found it incredulous that the Indians should know of the aridity and yet make no reservation of the waters:

> The Indians had command of the land and the waters—**command of all their beneficial use,** whether kept for hunting, and grazing roving herds of stock, or turned to agriculture and the arts of civilization. Did they give up this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?[6] [Emphasis added]

The Justice found that an affirmative answer to the questions he posed was no more acceptable than the view that the Indians were awed by the government and were deceived by its negotiators.[7]

The Court also rejected the argument that the reservation of the water was repealed by the admission of Montana into the Union:

> The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. [cases cited] That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.[8]

DEVELOPMENT OF THE "WINTERS DOCTRINE"

The modern implications of the *Winters* "reservation" doctrine are far-reaching and become all the more significant as the demands on the United States water supply increase. This comment is concerned with the question of whether or not an Indian tribe may sell or lease water, reserved to it under the *Winters Doctrine,* for use off the reservation.

The *Winters* decision stated that the Indians had command of all the beneficial use of the land and water and that they did not relinquish this command.[9] It becomes necessary, then, to trace the case law since 1907 to see what the courts have construed the word "beneficial use" to mean—does it include future as well as present uses? industrial and power as well as agricultural uses? the right to control the use of that water by non-Indians?

FUTURE AS WELL AS PRESENT NEEDS ACKNOWLEDGED

Within one year after *Winters,* a similar case arose, again in the State of Montana: *Conrad Investment Co. v. United States.*[10] This time

[5] *Id.* at 576.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 577.
[9] *Id.* at 576.
[10] Conrad Investment Co. v. United States, 161 Fed. 829, 88 C.C.A. 647 (9th Cir. 1908), affirming United States v. Conrad Investment Co., 156 Fed. 173 (9th Cir. 1907).

the controversy was over Birch Creek, one of the non-navigable boundaries of the Blackfeet Reservation, a treaty reservation. The Government sought to enjoin the defendants from damming up the creek. The defendants were enjoined from obstructing 33½ second feet of water from flowing down the natural channel. In reaching this resolution, the court acknowledged that this amount of water must be reserved for future as well as present uses by the Indians for agricultural and other beneficial uses.

> **The law of that case [Winters] is applicable to the present case, and determines the paramount right of the Indians of the Blackfeet Indian Reservation to the use of the waters of Birch Creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic and other beneficial purposes.[11]**

In 1921, an Idaho Federal District Court affirmed the need for acknowledging future uses. The court stated that Indian water rights are not limited to the extent of use at the time of the treaty. The Court also followed *Winters* in recognizing that the original grant was from the Indians to the United States.

In 1956, the Federal District Court for the State of Washington made a significant and somewhat inconsistent decision in *United States v. Ahtanum Irrigation District*.[13] The water involved was again on a treaty reservation.[14] The court explicitly stated that the quantum of *Winters Doctrine Rights* was not to be measured by the present needs alone.

> **It is obvious that the quantum is not measured by the use being made at the time the treaty reservation was made. The reservation was not merely for present but for future use. [cites Conrad Investment Co. v. United States][15]**

The *Ahtanum* opinion impliedly limits Winters Doctrine Rights to use in irrigation and agriculture. In this respect, the court is contradicting its own statement that the original grant of land, as in *Winters,* was from the Indians to the United States. The implication of the Winter's doctrine must be that the Indians originally had the right to *all* the beneficial uses of the water, not just the agricultural uses, and that they did not relinquish this right in any way by entering into the treaty. Aside from this apparent inconsistency, the court does recognize future uses and cites the *Powers*[16] case, *infra,* as giving Indian allottees the same water rights as enjoyed by the Indian grantor.[17]

Winters Rights on Allotted Lands

In a second Idaho case, *United States v. Hibner*,[18] the Federal Dis-

[11] *Id.* at 831.
[12] Skeem v. United States, 273 Fed. 93 (9th Cir. 1921).
[13] United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956).
[14] Yakima Treaty, 12 Stat. 951 (1855).
[15] United States v. Ahtanum Irrigation District, *supra* note 13 at 326.
[16] United States v. Powers, 305 U.S. 527 (1938).
[17] United States v. Ahtanum Irrigation District, *supra* note 13 at 342.
[18] United States v. Hibner, 27 F.2d 909 (9th Cir. 1928).

trict Court dealt with a transfer by an Indian allottee[19] to a non-Indian. The court found that failure of the Indians to use their water did not cause either an abandonment or a forfeiture of their rights thereto.[20] Concerning the extent of the non-Indian grantee's rights to water, the court said:

> **The whiteman as soon as he becomes the owner of the Indian lands, is subject to those general rules of law governing the appropriation and use of public waters of the state.[21]**

The whiteman thus becomes entitled to that amount of water being actually used for irrigation at the time of the transfer plus any more he diligently places under irrigation. It should be noted that this case suggests that "irrigation" is the exclusive beneficial use to which a *Winters Doctrine Right* can be applied.[22]

In 1938 another Montana controversy was presented to the United States Supreme Court in *United States v. Powers*.[23] The United States was seeking to prevent further taking of water from certain streams within the Crow Indian Reservation. The water was essential to the cultivation of respondent's lands which had been allotted to members of the tribe more than 20 years before and which was presently held under properly acquired fee simple titles. By treaty,[24] the United States had set aside a large tract of arid land, now within the State of Montana, as a reservation for the absolute and undisturbed use and occupation of the Crow Indians. In 1906, the Congress authorized the Secretary of the Interior to issue to Indian allottees patents in fee simple.[25] Thereafter, all restrictions as to sale, incumbrances, or taxation of these lands were removed. The Court could find nothing which would deny the allottees participation in the use of reservation water essential to farming and homemaking. The Court then denied an injunction and found that the rights of persons, who acquire land formerly a part of the reservation, to divert water for irrigation of such land from streams within the reservation is superior to a right to divert water for irrigation projects initiated prior to the allottment of the land in question. This was held to be true regardless of the fact that neither the original treaty nor the subsequent patent contained any express provisions concerning water rights.[26] Since the lands were valueless without the water, the water rights were constructively im-

[19]An allottee for purposes of this comment is one member of a tribe of Indians to whom a tract of land out of a common holding has been given by, or under the supervision of, the United States; this is in contrast to those lands of the reservation which are held in common by all members of the tribe.

[20]United States v. Hibner, *supra* note 18 at 912.

[21]*Id.* at 912.

[22]*Id.* at 911, citing Treaty of 1898, 31 Stat. 672, which reserves water necessary for irrigation.

[23]United States v. Powers, *supra* note 16.

[24]Treaty of May 7, 1868, 15 Stat. 649, 650-651.

[25]Act of May 8, 1906, Chapter 2348, 34 Stat. 182.

[26]United States v. Powers, *supra* note 16 at 532-33.

plied to be within the grants. The *Powers* case is significant because it involved the use of reservation water on land which had become non-Indian in ownership.[27]

THE PELTON DAM AND THE ARIZONIA V. CALIFORNIA DECISIONS

Since the *Powers* decision, the United States Supreme Court has issued only two decisions with significant bearing on Indian water right: *Arizona v. California* and *Federal Power Commission v. Oregon.*[28]

The *F.P.C. v. Oregon* case dealt with the building of the Pelton Dam on federal reservation land. The Court held that the Government did not have to obtain the permission of the State of Oregon to build a power project on federally "reserved" land. Although Oregon could control the uses of "public lands", the land of the reservation was not "public land" and was not subject to private appropriation and disposal under public land laws of Oregon or any other state.

> In the instant case the project is to occupy lands which come within the term "reservation", as distinguished from "public lands" . . . Public lands are lands subject to private appropriation and disposal under public land laws. Reservations are not so subject.[29]

It is interesting to note that although the federal government did not need the permission of the State of Oregon, it did seek and get the permission of the Indians before embarking on the power project. The lands involved in the controversy had been reserved to the Indians but "[M]ore recently they were reserved for power purposes and the Indians have given their consent to the project before us."[30] Query: does this imply that the Indians could have engaged in a similar project on their own?

The landmark decision of *Arizona v. California,* unlike the cases

[27]104 F.2d 334 (9th Cir. 1939). This is an exception to the above cases which recognize future use rather than limiting the water right to the present existing uses. In the *Walker River* case, the number of Indians was not increasing and it was unlikely that there would be cultivation of more than 2,100 acres. The Indians' experience over the past seventy years was held to be conclusive evidence of their needs and the quantity of water set aside for the Indians was fixed at an amount sufficient to irrigate the 2,100 acres. *See* CLARK, WATERS AND WATER RIGHTS, 142 (1967).

[28]Federal Power Commission v. Oregon, 349 U.S. 435 (1955); Arizona v. California, 373 U.S. 546 (1963). The basic controversy in *Arizona v. California* was over how much water each state has a legal right to use out of the waters of the Colorado River and its tributaries. A special master appointed by the Court conducted a lengthy trial and filed a report containing his findings, conclusion and recommended decree, to which various parties took exceptions. The court held that, in passing the Boulder Canyon Project Act, Congress intended to, and did, create its own comprehensive scheme for the apportionment among California, Arizona and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each state her own tributaries. The court decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada, and that Arizona and California should each get one-half of any surplus. Congress gave the Secretary of the Interior adequate authority to accomplish this division by giving him power to make contracts for the delivery of water and by providing that no person could have water without a contract.

[29]Federal Power Commission v. Oregon, *supra* note 28 at 443.

[30]*Id.*

discussed thus far, involves navigable water—the Colorado River. The above cases, *Winters* through *Pelton Dam,* were theoretically justified by the treaty—making power or the federal proprietary right, or both.[31] The treaty power, however, was not applicable in the *Arizona* situation because none of the reservations involved were formed by treaty. Instead, *Arizona* was based on the federal commerce clause power to control navigation. This power is, in effect, as extensive as the proprietary interest in non-navigable waters:

> In other words, the power of the United States over navigable streams is so complete that in reality, if not in legal contemplation, the United States can deal with such streams as though it owned them. It can take over the entire streamflow, dam it, and distribute it inter- and intrastate under its own allocation scheme and in disregard of state law. That, after all, was the main import of **Arizona v. California.**[32]

After justifying the federal government's exercise of control over the Colorado River, the Court went on to quantify the amount of *Winters Doctrine Rights* on the Indian reservation involved.

> We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the **practically irrigable acreage** on the reservations. [Emphasis added][33]

The Supreme Court, in the *Arizona* decision, failed to mention either the transferability of the Indian water rights or the possibility of their being changed from agricultural to higher uses. These questions are then left open to speculation based on the precedent prior to *Arizona.* Before leaving this decision, attention should be brought to parts of the Master's report not mentioned in the Court's opinion. The Master hoped to facilitate the best economic use of Indian water, thus he chose irrigable acreage as his standard for fixing quantities. He noted that his quantification of the Indian water right on the basis of irrigable acreage was not intended to limit the use of the water to agriculture.[34] He also suggested that nothing in his proposed decree precluded the transfer of the land and water together or of the water right alone. Professor Meyers of Stanford[35] suggests that although the Master did not decide the question of change of use, he did invite attention to three essential characteristics of a marketable property right; freedom of transfer, freedom of use and quantification.[36] The Master thus opened the door to the selling and leasing of Indian water rights if the Indians and the federal government so desire.[37]

[31]Property Clause of Federal Constitution, U.S. CONST. art. IV, § 3.
[32]Morreale, *Federal-State Conflicts Over Western Waters,* 20 RUTGERS L. REV. 423, 443 (1966).
[33]Arizona v. California, *supra* note 28 at 600 (opinion).
[34]*See,* Master's Report 263-66, cited in Arizona v. California, *supra* note 28.
[35]Professor Meyers is the author of an extensive article dealing with the water rights in *The Colorado River,* 19 STAN. L. REV. 1 (1966).
[36]*See,* Master's Report, 265-66, *supra* note 28.
[37]*Id., see also,* 19 STAN. L. REV., *supra* note 33 at 71.

The preceding review of the case law from Winters up to the present suggests that the *Winters Doctrine* has come to represent a few basic and generally accepted propositions:

1. The priority date of a water right on a federal reservation is the date the reservation was created. State water rights created prior to this date are superior; subsequent state water rights are subordinate.[38]

2. Winters Doctrine Rights, unlike appropriative rights, do not depend upon a diversion and an application to a beneficial use. "The reserved rights arise when the reservation is established even though the water right is not exercised for decades thereafter."[39] Also, non-use does not work a forfeiture or an abandonment of the water right.[40]

3. Winters Doctrine Rights need not be created or exercised in accordance with state law.[41]

4. The quantity of water to be enjoyed under a Winters Doctrine Right is measured by the quantity necessary to fulfill the purposes of the reservation, both present and future. In the *Arizona* case, the Court quantified this amount as the amount required to irrigate all the irrigable land on the reservation. This quantity represents the amount of water the Indians are entitled to for all time unless the reservation is enlarged in terms of irrigable acreage.

The questions of whether or not the Indians can use their quota of water for other than agricultural purposes, and whether they can lease water they are not using, remain unanswered by the case law.

Observations of the Authorities on the Winters Doctrine

Mr. William Veeder, a noted authority on Indian water rights, stated unequivocally, "Winters Doctrine Rights to the use of water for Indian Reservations are not limited to purposes of irrigation."[42] Mr. Veeder's writings, however, are not so explicit as to whether or not Winters Doctrine water can be used off the reservation. In a recent article, Mr. Veeder suggests that Indian water rights are to be exercised only on the Indian land. He states that Indian water rights are:

> . . . like all other rights to the use of water, interests in real property, having the dignity of freehold estates. They are usufructuary and do not relate to the corpus of the water itself. Being interests in real property, Winters Doctrine Rights to the use of water pass to non-Indians when the lands of which they are part and parcel are transferred.[43] [Emphasis added]

[38]Master's Report 257, 376 U.S. at 340 (decree).

[39]Master's Report 257, 376 U.S. at 340 (decree).

[40]United States v. Hibner, *supra* note 18 at 912; Master's Report 257, 261-62, *supra* note 28.

[41]Winters v. United States, *supra* note 1 at 577.

[42]Veeder, *Winters Doctrine Rights*, 26 Mont. L. Rev. 149, 170 (1965).

[43]Veeder, *Indian Prior Rights to Use of Water*, 16 Rocky Mountain Mineral Law Institute 631, 657 (1971).

However, in the MONTANA LAW REVIEW, Mr. Veeder differentiates between Winters Doctrine Rights and riparian rights which can be used only on riparian land. "There is, of course, no legal basis for any limitation of Winters Doctrine Rights to the watershed in which the government land is situated."[44] On the one hand, Mr. Veeder has said that Winters Doctrine Rights are "part and parcel" of the reservation land, and on the other had he has suggested that they are not like riparian rights restricted to use on the riparian land only.

In a third and later article, Mr. Veeder seems to have resolved the apparent conflict in his writings:

> There are reservations where the land is so poor that the Winters Doctrine Rights are perhaps the only resource of value. Sale or lease of water on Indian reservations may thus prove to be the highest, best or most profitable use under those circumstances.[45]

Another noted authority on Indian law, Mr. Felix Cohen, is of a contrary view. He feels that "the *Powers* case compels the view that the right to use water is a right appurtenant to the land within the reservation and that unless excluded, it passes to each grantee in subsequent conveyances of allotted land."[46]

The authors of WATER AND WATER RIGHTS[47] contend that "[T]he Indians and the United States on their behalf, have the same rights as the owner of any other water right to lease or sell."[48] Two cases are cited for support of this proposition: *Skeem v. United States* and *Segundo v. United States*.[49] Both these cases, however, deal with the sale or lease of *allotted* land which carries with it the right to use a corresponding Indian water right. The *Segundo* decision stated:

> [A]n allotment of tribal land includes a just share of tribal water rights, [cites **U.S. v. Powers**] and this court has jurisdiction in this action to declare that a right to a just share of tribal waters is appurtenant to and accompanies an allotment of tribal land, 28 U.S.C. § 2201.[50]

Neither case speaks to the issue of using Indian water rights on lands that were not at one time reserved to the Indians.

[44]MONT. L. REV., *supra* note 42 at 161.

[45]VEEDER, WINTERS DOCTRINE RIGHTS IN THE MISSOURI RIVER BASIN, Ms. 1, 19 (1965), cited in ROCKY MOUNTAIN MINERAL LAW INSTITUTE, *supra* note 43 at 691.

[46]COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220 (1942).

[47]CLARK, WATERS AND WATER RIGHTS (1967).

[48]*Id.* at 396.

[49]Skeem v. United States, 273 Fed. 93 (9th Cir. 1921). This case dealt with lands allotted to Indians through federal patents. The court held that water rights appurtenant to the land reserved to the Indians were not lost by the leasing of the land. " . . . [I]t seems clear that water was intended to be permanently reserved for the tracts which the Indians chose not to relinquish, and that neither the actual leasing of their lands under the authority to lease nor the surrender of possession to the lessees operated to relinquish any water rights in the land which they so chose to retain."

Segundo v. United States, 123 F. Supp. 554 (S.D. Calif. 1954) also deals with lands allotted to Indians under federal patents.

[50]Segundo v. United States, *supra* note 49 at 558.

WATER RIGHTS—REAL OR PERSONAL PROPERTY?

There is considerable confusion as to whether a water right, on or off a reservation, is a real or personal property right. Mr. Veeder has stated that Winters Doctrine Rights are real property.[51] Wiel, in his work on water rights, stated that a water right of appropriation is real estate independent of ownership or possession of any land and independent of place or use or mode of enjoyment.[52] The State of Idaho considers a water right to be a real property right which may be sold and transferred separately from land on which it has been used.[53] The State of Montana, under its doctrine of prior appropriation, considers a water right to be personal property which can be sold separately from the land on which it has been used.[54]

The personal property right approach is the more logical of the two theories since a water right is a mere "use" right; it confers no ownership in the corpus of the water or in the channel of the stream.[55] Aside from this disagreement, the authorities seem to agree that the water right, whether personal or real property, exists independently of the land and can be transferred apart from the land.[56]

THE TWEEDY CASE

Four years ago, Judge Russell Smith of the United States District Court for Montana held that *need* and *use* are a prerequisite to Indian water rights, *i.e.* absent a showing by the Indian plaintiffs that the defendants had interferred with their right to use the water in satisfaction of a need, the Indians failed to establish any title and were not entitled to recover damages. Judge Smith felt that the Indians should not be allowed "to play the role of the dog in the manger."[57] This case, *Tweedy v. Texas Company,* limits Winters Doctrine Rights to that amount of water actually being used by the Indians to satisfy a need, thus precluding the sale or lease of any water not being used on the reservation. The theory of the *Tweedy* case is in basic accord with the law of prior appropriation in that a person has a right only to that amount of water which he is putting to a beneficial use and no more. However, as Mr. Veeder points out, the doctrine of prior appropriation and the Winters Doctrine are at variance because Winters Doctrine Rights take future use into consideration along with actual

[51]ROCKY MOUNTAIN MINERAL LAW INSTITUTE, *supra* note 43.

[52]1, WIEL, WATER RIGHTS IN WESTERN UNITED STATES 304 (3rd ed. 1911).

[53]Federal Land Bank of Spokane v. Union Cent. Life Ins. Co., 54 Ida. 161, 29 P.2d 1009, 1011 (1934).

[54]Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936); Brady Irr. Co. v. Teton County, 107 Mont. 330, 85 P.2d 350 (1938).

[55]BLACK'S LAW DICTIONARY 1762 (4th ed. 1968).

[56]With the exception of Felix Cohen in his HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 46.

[57]Tweedy v. Texas Company, 286 F.Supp. 383 (D. Mont. 1968).

present use.[58] In light of the case law up to and including *Arizona v. California,* the *Tweedy* case is a minority holding in that it requires present need and use as prerequisites to Indians' water rights. The weight of authority does not limit Winters Doctrine Rights by the concepts of actual use and present need, *i.e.* regardless of the amount of water they actually use and need at the present time, the Indians have a right to that amount of water needed to irrigate their irrigable acreage.[59]

THE CONCEPT OF "NEED" AS MORE THAN "IRRIGATION"

As discussed above, Winters Doctrine Rights do include future as well as present needs. The next step of clarification deals with the concept of Indian "need": the concept should not be restricted to traditional agrarian and domestic purposes. Originally, the expressed intent of the the United States Supreme Court in reserving the water in the *Winters* case was to facilitate the "civilization" of the Indians. When the *Winters* decision was issued, the United States was still basically a rural populace with predominantly agrarian interests. It is, therefore, not surprising that *Winters* reserved the water specifically for "irrigation" and more generally for "other beneficial purposes". We are now, however, a highly industrialized nation and we must give more consideration to the "other beneficial uses" mentioned in *Winters.*

The water reserved under the Winters Doctrine should be looked upon as one of many natural resources existing on Indian land and should be open to the same avenues of development as are the other resources. Thus far, Congress has provided for the leasing of both allotted and unallotted lands within Indian reservations for purposes of mining, with the approval of the Secretary of the Interior.[60] Indian lands may also be leased for purposes of oil and gas mining.[61] The lands themselves may be leased for purposes of farming.[62] 25 U. S. C. §407 provides that timber on unallotted lands of any Indian reservation may be sold and the proceeds from such sales shall be used for the benefit of the Indians of the reservation. Reserved water rights appear to be the only major natural resource that Congress has not included within the leasing provisions.

CONCLUSION

Congress should provide for the leasing of reserved waters for use off the Indian reservations. As trustee for the Indians, the government must encourage and promote the development of Indian resources rather than chaining them to the agrarian world of the 1800's. As Mr.

[58]MONT. L. REV., *supra* note 42 at 163.

[59]Arizona v. California, *supra* note 28.

[60]25 U.S.C. §396 on allotted lands and 25 U.S.C. §396a on unallotted lands.

[61]25 U.S.C. § 398 on leases of unallotted lands for oil and gas mining purposes.

[62]25 U.S.C. § 402a on lease of unallotted irrigable lands for farming purposes. 25 U.S.C. § 403 on leases of Indian allotments held under trust patents.

Veeder has pointed out,[63] there are many Indian lands so extremely poor that the Winters Doctrine Rights are the only resource of any real value.

The sale and leasing of water rights would not only enhance the economy of the reservation but would be consistent with the following legal policies and principles involved:

1. The *Winters* rationale of promoting the well-being and "civilization" of the Indians.

2. The Supreme Court's latest "reservation doctrine" case, *Arizona v. California,* which measured the quantum of reserved water by the irrigable acreage but which, according to the Master's report, did not restrict the uses to which the water can be put.

3. Western United States water law, *i.e.* a water right, be it personal or real property, is independent of land ownership and may be used or transferred separately.

4. Congressional policy of allowing the leasing of all other major natural resources on Indian lands, both allotted and unallotted.

The most serious objection to the recognition of unlimited, immemorial Winters Doctrine Rights as expounded by such advocates as Mr. Veeder, is that they would result in a completely unstable situation for the rest of the neighboring water users.

> **Obviously, the ownership and exercise of a first right to an unlimited quantity of water in western streams by Indian tribes outside the jurisdiction of state water officials would give rise to a chaotic situation.[64]**

The Supreme Court's adoption of the "irrigable acreage" standard, however, has probably done away with this uncertainty. Subsequent adjudications of Indian water rights will probably follow suit and adopt this same standard and the Indians will not hold a cloud over all titles forever.[65] Assuming that each reservation's water right can be quantified by this standard of irrigable acreage, there is no real policy reason for denying the Indians the right to lease or sell their water rights, so long as they do not exceed their quota. There would be no resulting instability and the water right would be benefiting more people than it would be unexercised on the reservation.

[63]Veeder, *supra* note 45.

[64]Bloom, *Indian Paramount Rights To Water Use,* 16 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 669, 691 (1971).

[65]Clark, *supra* note 47 at 386.